IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner respectfully prays this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment entered on March 7th, 1950.

The Court of Appeals reversed the judgment of the District Court entered on petitioner's motion for summary judgment. It directed the District Court to allow Respondent to dismiss without prejudice.

The Court of Appeals by judicial fiat has stricken from Rule 41 (a) (2) of the Rules of Civil Procedure the clause denoting the District Court's discretionary power to specify in the order that the dismissal is with prejudice, viz:

Rule 41 (a) (2)

> "By order of court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

The Court of Appeals held: (1) When respondent moved to dismiss "without prejudice and without costs" the District Judge was bound to permit dismissal without prejudice. (2) Rule 41 (a) (2) of the Rules of Civil Procedure empowered the court to fix terms of dismissal; but did not permit it to deny the motion. (3) For nineteen days before respondent moved to dismiss, the Judge had had under advisement petitioner's motion for summary judgment; the Court of Appeals held, however, that the motion to dismiss divested the District Judge of discretion except to fix the terms of dismissal (R. 49).

Petitioner represents to this court:

SUMMARY AND SHORT STATEMENT.

Respondent is a resident of Missouri (R. 2). Petitioner, a Delaware Corporation (R. 2), is amenable to court process in Missouri. Respondent sued petitioner on October 1, 1948 in United States District Court at Chicago (R. 2). He alleged: He was employed by Kelley Asbestos Products Company. While working for Kelley, he was injured in Petitioner's plant near Kansas City, Missouri, on July 2, 1946 (R. 2-3).

Petitioner pleaded: A. The Illinois two year statute of limitations; B. Respondent had received an award under the Missouri Workman's Compensation Act against Kelley Asbestos Products Company (R. 7-8).

Respondent filed thirty-two interrogatories for petitioner to answer (R. 4-6). Thirty-one required information available in Missouri exclusively (R. 4-6).

Petitioner on November 12, 1948 moved for judgment (R. 9) on the ground actions for injury to the person are to "be commenced within two years next after the cause of action accrued." Ill. R. S. Chap. 83 Sec. 15 (R. 9). The District Court took the motion under advisement.

On December 1, after the court had had Petitioner's motion for summary judgment under advisement for nineteen days, Respondent moved to dismiss "without prejudice and without costs" (R. 10).

Respondent did not in his motion, nor at any time before judgment was entered, indicate to the court he was interested in a dismissal on terms other than "without prejudice and without costs" (R. 10).

On December 6, in support of his motion to dismiss "without prejudice and without costs", Respondent urged:

A. The Missouri statute of limitations was five years. Mo. R. S. 1939, Sec. 1014 (R. 11). Respondent would have until July 1, 1951 to commence his suit in Missouri.

B. The court in the alternative might transfer the cause to United States District Court at Kansas City, Missouri, under section 1404 of the Judicial Code. 28 U. S. C. A. 1404. (R. 12).

C. Respondent's recovery against his employer under the Missouri Workmen's Compensation Act alleged in Petitioner's answer (R. 7-8) does not bar an action against a third person.

Respondent cited the Missouri statute. Mo. R. S. 1939, Sec. 3699 (R. 12). Under this section the right of recovery is in the employer. After deducting the expense of suit and reimbursing himself for compensation paid, the employer pays the residue to the employee (See Appendix for statute, *infra* 17).

Respondent did not claim there was east of Missouri any witness for his case.

The judge held: Respondent selected the forum. The Court was obliged to apply the law as it exists in the district (R. 22-23). 81 F. Supp. 851.

On February 4, 1949, Respondent filed a motion to set aside the judgment. Respondent stated "that his motion for leave to dismiss without prejudice and without costs was inadvertently made, and should not have requested leave to dismiss without costs" (R. 24).

This motion was denied (R. 33).

In Missouri a judgment for defendant rendered in another jurisdiction on a plea of limitations is a defense to a second action. The rule applies even though the Missouri statute of limitations has not run when the second action is begun. *Fulton Iron Works* v. *Riggin*, 14 Mo. App. 321; *Wernse* v. *McPike*, 100 Mo. 476, 13 S. W. 809.

The Court of Appeals held: that Rule 41 (a) (2) of the Rules of Civil Procedure, 28 U. S. C. A. 723C, gives plaintiff an absolute right to dismiss restricted only by the requirement that it be upon order of the court and upon such terms and conditions as the court deems proper (R. 39). 180 F. (2) 379 at 381.

BASIS FOR JURISDICTION OF THIS COURT.

This Court has jurisdiction under Title 28, United States Code, Section 1254 (1).

THE QUESTIONS PRESENTED.

I.

Does not the italicized clause of the following provision of Rule 41 (a) (2) of the rules of Civil procedure:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice." (Emphasis supplied.)

denote that the judge may specify in the order that dismissal is with prejudice?

II.

When Respondent on December 1, 1948, moved to dismiss "without prejudice and without costs" (R. 10) did he thereby divest the district judge of discretion to rule on the motion for summary judgment which motion the court had had under advisement for nineteen days (R. 9)?

III.

When a motion to dismiss without prejudice is made under 41 (a) (2) of the Rules of Civil Procedure, does the District Court have any discretion to consider the merits of the motion, or is the District Court regardless of the merits of the motion bound to order dismissal on terms?

REASONS FOR ALLOWANCE OF WRIT.

I.

The Court of Appeals by construction has deleted from Rule 41 (a) (2) of the Rules of Civil Procedure the clause which we italicize:

> "By order of Court. * * * an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. * * * *Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."

The clause was intended to denote a discretion in the District Judge to allow or not to allow a plaintiff to dismiss without prejudice. This important question of Federal law has not been but should be passed upon by this court.

II.

a. The Court of Appeals has construed Rule 41 (a) (2) of the Rules of Civil Procedure as requiring the District Court to allow a plaintiff to dismiss without prejudice at any time before final judgment. The decision conflicts with *U. S.* v. *Pacific Fruit* (1943 9 Cir.), 138 F. (2d) 367. In this latter case plaintiff unsuccessfully moved for a continuance. Plaintiff then asked leave to dismiss without prejudice. The Judge ruled that dismissal without prejudice would be on condition the Government pay a certain sum to the defendant as costs. Upon failure of the Government to pay, the court dismissed the action with prejudice. The Court of Appeals held that the order that the Government pay costs was void, that the Trial Judge under

Rule 41 (a) (2) was vested with discretion empowering him to deny the motion to dismiss without prejudice and to dismiss the cause on the merits.

The Court of Appeals for the Fourth Circuit in *Rollison* v. *Wash. Nat. Ins. Co.* (1949), 176 F. (2d) 364 at par. 4, p. 367 held that Rule 41 vests the District Court with discretion to deny a motion to dismiss without prejudice.

b. The ruling by the Court of Appeals that the District Judge was bound to allow dismissal without prejudice to permit respondent to file his action in Missouri is squarely in conflict with a decision by the Second Circuit prior to the adoption of the Rules of Civil Procedure.

In *Young* v. *Southern Pacific Co.* (1928), 25 F. (2d) 630 the proceeding had been removed from the State Court. The defendant moved to dismiss on the ground of laches. The court allowed complainant to dismiss without prejudice on payment of costs. Complainant intended to file suit in the State Court and vary the allegations so as to avoid removal. The Court of Appeals reversed, stating that the District Court should pass upon the motion to dismiss for laches.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
DOMINICK VARRAVETO, JR.,
Its Attorneys.

HUBBARD, HUBBARD & DORGAN,
Of Counsel.

IN THE

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No. .....

GENERAL MOTORS CORPORATION,
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vs.

CHRIS BOLTEN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Judge is published in 71 F. Supp. 851. It is printed in the record (R. 22, 23). The opinion by the Court of Appeals is reported in 180 F. (2d) 379. It is in the record (R. 46).

JURISDICTION.

The court has jurisdiction under Title 28 United States Code, Sec. 1254.1.

STATEMENT OF CASE.

For brevity the Court is respectfully referred to the petition (*supra*, pp. 3-5).

SPECIFICATION OF ERROR.

1. The Court of Appeals erred in holding that under Rule 41 (a) (2) of the Rules of Civil Procedure, the District Court is bound to allow a plaintiff's motion to dismiss without prejudice.

2. The Court of Appeals erred in holding that the motion to dismiss without prejudice must be granted regardless of the state of the proceedings.

3. The Court of Appeals erred in reversing the judgment for petitioner.

SUMMARY OF POINTS.

I.

After the answer had been filed and the motion for summary judgment on the ground of limitations, had been under advisement for 19 days, the District Judge was vested with discretionary power to allow or to deny a motion for leave to dismiss without prejudice. The court might deny a dismissal, where the purpose was to institute another suit in another jurisdiction where the Statute of Limitations had not run.

U. S. v. *Pac. Fruit* (9th Cir. 1943), 138 F. (2d) 367.

Rollison v. *Wash. Nat. Ins. Co.* (1949, 4th Cir.), 176 F. (2d) 364 at 367.

Love v. *Mason* (1946 D. C. La.), 66 F. Supp. 753.

Henjes v. *Aetna Ins. Co.* (1941 D. C. N. Y.), 39 F. Supp. 418.

Wall v. *Conn. Mutual Life Ins. Co.* (1941 D. C. Ga.), 2 F. R. D. 244.

Cinn. Traction Bldg. Co. v. *Pullman Standard Car Co.* (D. C. Del., 1938), 25 F. Supp. 322.

Roth v. *Great Atlantic & Pacific Tea Co.* (D. C. Ohio, 1942), 2 F. R. D. 182.

Colonial Oil Co. v. *American Oil Co.* (D. C. S. C., 1943), 3 F. R. D. 29.

II.

After it appeared the motion for summary judgment was well founded, the court was not bound to permit the dismissal of the action without prejudice in the absence of any equitable circumstances warranting such dismissal.

International Shoe Co. v. *Cool* (1946, 8th Cir.), 154 F. (2d) 778 at 779, 780.

Young v. *So. Pacific Co.* (1928, 2nd Cir.), 25 F. (2d) 630.

ARGUMENT.

I.

When respondent made his motion to dismiss without prejudice and without costs, the court had had under advisement the motion for summary judgment for nineteen days. Respondent's motion was attended by no equitable circumstance. Respondent had admittedly recovered on his claim in Missouri. He did not explain why he in lieu of his employer was suing. Respondent had brought suit in Chicago far from the scene of the accident and the residence of the witnesses. On the record the defendant was entitled to judgment. Because the court was ready to pronounce judgment for defendant respondent then made his motion to dismiss.

Under the holding in *U. S.* v. *Pac. Fruit,* 138 F. (2d) 367, the court was vested with a discretion to allow or deny the motion. The same holding was made in *Rollison* v. *Wash. Nat. Ins. Co.,* 176 F. (2d) 364 at 367.

In *Love* v. *Mason,* 66 F. Supp. 753, defendant moved to dismiss on the ground of limitations. Plaintiff moved to dismiss without prejudice in order that he might commence a suit in a jurisdiction where the Statute of Limitations had not run. Judgment for defendant.

In *Henjes* v. *Aetna Ins. Co.,* 39 F. Supp. 418 the court denied the motion to dismiss without prejudice because it appeared that the plaintiff intended to institute another action.

In *Wall* v. *Conn. Mutual Life Ins. Co.,* 2 F. R. D. 244 the plaintiff stated that she had made a technical error in having the *ad damnum* more than $3,000. The court denied the motion to dismiss without prejudice on the ground that

the plaintiff was going to institute another action in another court.

In *Cinn. Traction Bldg. Co.* v. *Pullman Standard Car Co.*, 25 F. Supp. 322, the court denied a motion to dismiss without prejudice on the ground the defendant had spent considerable time and money for preparation and was entitled to have the matter decided.

In *Roth* v. *Great Atlantic & Pacific Tea Co.*, 2 F. R. D. 182 the Supreme Court of Ohio rendered a decision bearing upon the merits of controversy. Defendant moved for summary judgment. Plaintiff moved to dismiss without prejudice at plaintiff's costs. The court granted the motion for summary judgment.

In *Colonial Oil Co.* v. *American Oil Co.*, 3 F. R. D. 29 the plaintiff filed suit in the District Court, obtained a judgment on a verdict which was reversed because of the court's instruction on punitive damages. Plaintiff moved to dismiss without prejudice. Denying the motion the court held that Rule 41 (a) (2) made dismissal without prejudice discretionary.

The practice has been uniform that plaintiff does not have a right to dismiss after answer has been filed. The matter rests in the sound discretion of the trial court taking into consideration all the facts and circumstances. The end of Rule 41 (a) (2)—"*Unless otherwise specified in the order,* a dismissal under this paragraph is without prejudice."—clearly evinces a discretionary power in the court to specify in the order that the dismissal is with prejudice.

II.

When the motion for leave to dismiss without prejudice and without costs was made, the District Court had had under advisement a motion for summary judgment for nineteen days. The petitioner was clearly entitled to judgment upon its motion.

In *International Shoe Co.* v. *Cool*, 154 F. (2d) 778, the court allowed dismissal without prejudice after it had indicated that it would direct a verdict. The Court of Appeals relying upon Rule 41 (a) (2) stated that the discretion was not an arbitrary one. It reversed the judgment directing the District Court to enter judgment dismissing plaintiff's action on its merits.

In *Young* v. *So. Pacific Co.*, 25 F. (2d) 630 the court allowed the motion to dismiss without prejudice when it had under advisement defendant's motion to dismiss on the ground of laches. The Court of Appeals for the Second Circuit held this was reversible error.

No case cited by the Court of Appeals construes Rule 41 (a) (2) as requiring the District Court to allow dismissal without prejudice (R. 48, 49, 50).

In *Hydraulic Press Mfg. Co.* v. *Williams White Mfg. Co.*, 165 F. (2d) 489, (R. 48), the court denied plaintiff's motion to dismiss without prejudice. The Court of Appeals affirmed.

In *Home Owners Loan Corp.* v. *Hoffman*, 134 F. (2d) 314 (R. 48), the District Judge permitted the plaintiff to dismiss without prejudice. The Court of Appeals reversed, holding that the District Judge abused his discretion in not requiring the plaintiff to pay costs. Insofar as the Court of Appeals discussed the question here involved, the opinion conflicts with the opinion of the Seventh Circuit.

Insofar as *Reardon* v. *Chapman*, 169 F. (2d) 909, (R. 49), bears on the question here involved, it is diametrically contrary to the holding of the Court of Appeals herein.

Titus v. *Wells Fargo, etc.*, 134 F. (2d) 223 (R. 50), involved an agreement made in California not to plead the Statute of Limitations. The agreement was enforceable in California. It was enforceable in Washington, D. C. where the parties were resident. The Court of Appeals held that in the State of Texas where the suit was begun, such agreement was contrary to public policy. It reversed the judgment in plaintiff's favor remanding the case, stating that the District Court should allow a dismissal. No motion was ever made to dismiss without prejudice. Rule 41 (a) (2) of the Rules of Civil Procedure was never mentioned.

Thus we respectfully submit that the judgment of the Circuit Court of Appeals for the Seventh Circuit is clearly erroneous, that it establishes a precedent which will create confusion, and it should be reversed.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
a corporation,
Petitioner,

By ALVIN G. HUBBARD,
REESE HUBBARD and
DOMINICK VARRAVETO, JR.,
Its Attorneys.

HUBBARD, HUBBARD & DORGAN,
Of Counsel.

APPENDIX.

MISSOURI REV. STAT. 1939, SEC. 1014:

"Where a third person is liable to the employee * * * for the injury, * * * the employer shall be subrogated to the right of the employee * * * against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee, but such employer may recover any amount which such employee * * * would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employee * * *, and shall be treated as an advance payment by the employer, on account of any future installments of compensation."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 82

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

CHRIS BOLTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALVIN G. HUBBARD,
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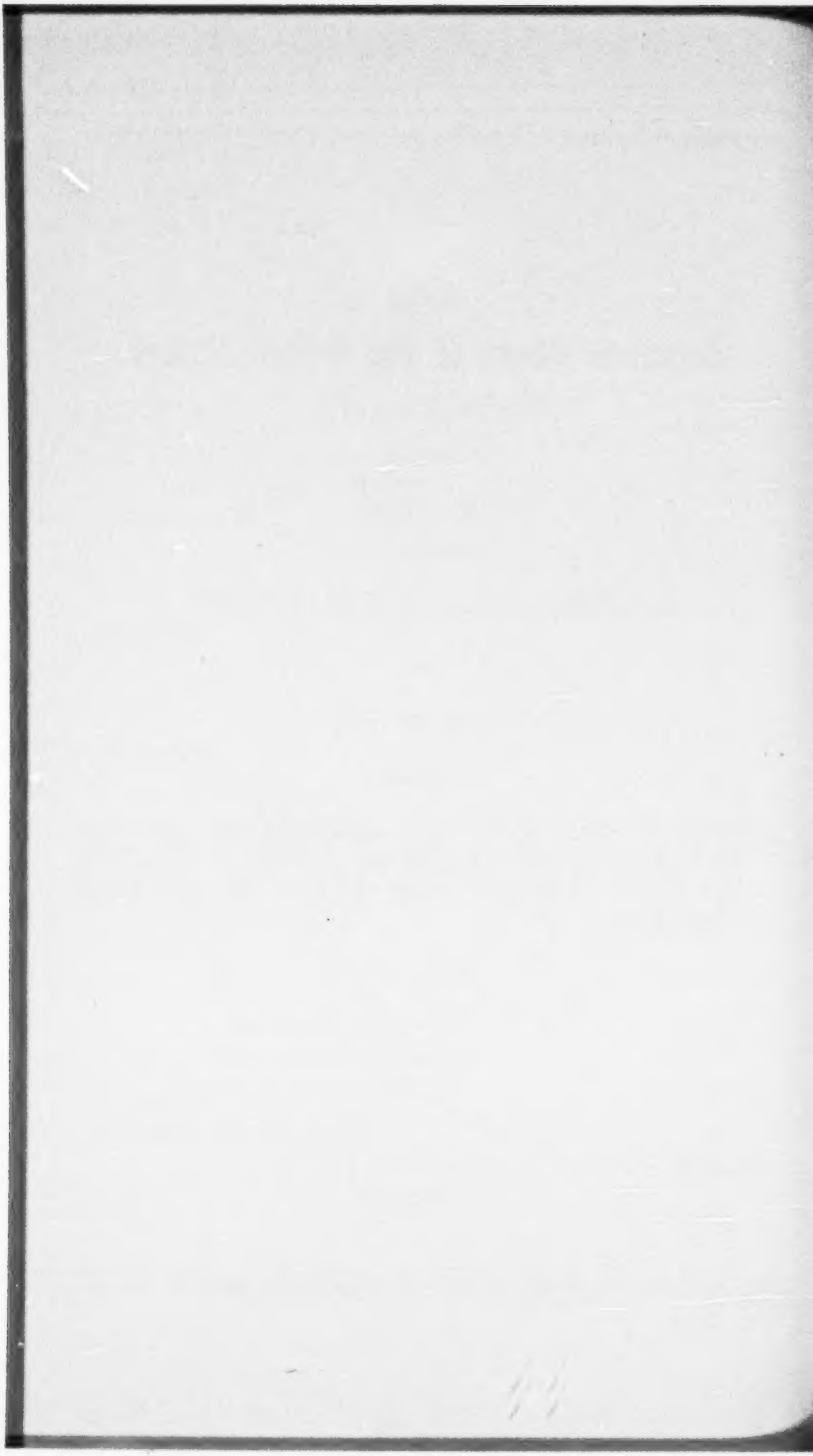

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In the

Supreme Court of the United States

October Term, 1949.

GENERAL MOTORS CORPORATION, *Petitioner,*

vs.

CHRIS BOLTEN, *Respondent.*

No. 833.

BRIEF OF RESPONDENT ON PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

Respondent was injured in Kansas City, Missouri, through negligence of the petitioner July 2, 1946. Missouri has a 5-year statute of limitations governing tort actions. Respondent inadvertently commenced this action against the petitioner in the United States District Court for the Northern District of Illinois about two and one-half years after the date of his injury, and after the Illinois 2-year statute of limitions on tort actions had run. Petitioner filed its motion in the District Court for summary judgment based on the Illinois statute of limitations (9). Respondent then filed his motion for leave to dismiss

without prejudice (10) which the District Court denied, entering summary judgment in petitioner's favor on the ground that respondent's cause of action was barred by the Illinois statute of limitations (22-23), *Bolten* v. *General Motors Corp.*, 81 F. Supp. 851. Respondent appealed and prevailed in the United States Court of Appeals, Seventh Circuit, which reversed and remanded (46-50), *Bolten* v. *General Motors Corp.*, 180 F. (2d) 379, holding that plaintiff had a right to dismiss without prejudice on terms and conditions to be fixed by the trial court under Rule 41 of the Rules of Civil Procedure and that a judgment based on the two-year Illinois limitation period was not a judgment on the merits of the case and would not estop respondent from pursuing his rights against the petitioner in Missouri.

We cannot understand the dogged determination with which petitioner insists that its motion for summary judgment based on limitations should be sustained. The entry of that judgment would mean merely that respondent cannot maintain an action for his injuries against the petitioner in the State of Illinois, that and no more. A judgment based on limitations is not a judgment on the merits and cannot form the basis of a plea of *res judicata* in those jurisdictions where the statute of limitations has not run. This principle is exhaustively expounded in *Warner, et al.*, v. *Buffalo Drydock Co.*, 67 F. (2d) 540, 541, 542.

In Restatement of the Law of Judgments this principle is applied to the very facts present on this record.

Section 49 of that work states this rule:

> "Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter

maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided."

In the Comment (a) the editors say:

"* * * Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintianing an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State."

The opinion of the Seventh Circuit which petitioner seeks to attack is sound. It rests on undisputable authority.

We do not believe that any good reason exists for a re-examination of the questions involved, and we respectfully pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIORARI DENIED